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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District: <i>Massachusetts</i>
Name (under which you were convicted): <i>John Powell</i>		Docket or Case No.: <i>09-P-999</i>
Place of Confinement: <i>MCI Concord</i>		Prisoner No.: <i>W86642</i>
Petitioner (include the name under which you were convicted) <i>John Powell</i> <i>Middlesex</i>		Respondent (authorized person having custody of petitioner) <i>Bruce Gelb</i> <i>Middlesex</i>
The Attorney General of the State of		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

(b) Criminal docket or case number (if you know):

2. (a) Date of the judgment of conviction (if you know):
- November 10 2005*

(b) Date of sentencing: *November 23 2005*

3. Length of sentence:
- 2nd degree life*

4. In this case, were you convicted on more than one count or of more than one crime?
- ☒
- Yes
- ☐
- No

5. Identify all crimes of which you were convicted and sentenced in this case: *Whether the appeals court decision upheld Powell's argument that the trial judge's disbarment was a violation of his right to be present for the proceedings against him?*

6. (a) What was your plea? (Check one)

☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea

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(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to?

N/A

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: *Massachusetts appeals court*

(b) Docket or case number (if you know): *09-P-899*

(c) Result: *convictions affirmed, except for possession with intent to distribute cocaine with*

(d) Date of result (if you know): *aside. January 31, 2011*

(e) Citation to the case (if you know):

(f) Grounds raised:

(g) Did you seek further review by a higher state court? ☒ Yes ☐ No

If yes, answer the following:

(1) Name of court: *Supreme Judicial Court*

(2) Docket or case number (if you know):

(3) Result: *application for further appellate review denied*

(4) Date of result (if you know): *April 1, 2011*

DID YOU SEEK FURTHER REVIEW BY A HIGHER COURT?

1. Whether the trial judge's discharge of a juror who called in sick to a court officer, without a hearing and without the presence of and/or prior notice to the Defendant and his counsel, violated the Defendant's constitutional right to be present for the proceedings against him?

2. Whether the Commonwealth's admitted suppression of exculpatory fingerprint evidence for a period of over three and one-half years and until after the commencement of the trial, violated Defendant's due process rights under Brady v. Maryland, 373 U.S. 83, 87 (1963) and its progeny, and was so egregious that it should have resulted in a new trial or, at the very least, the preclusion of testimony from the Commonwealth's fingerprint expert?

3. Whether there were fatal deficiencies in the Commonwealth's expert ballistic evidence that rendered it unreliable and inadmissible for due process purposes under *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579 (1993)?

4. Whether the evidence was insufficient to convict the Defendant as a matter of due process of law?

5. Whether the trial judge's erroneous admission of the hearsay drug certificate in violation of Defendant's confrontation rights, see *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), not only required a reversal of the drug conviction, but also, required a reversal of the murder conviction?

Regarding the first point, we argued that the trial judge, in violation of Defendant's due process rights, discharged a pregnant juror, who telephoned a court officer and said she felt ill, without holding a hearing and without the presence of and/or prior notice to the defendant and his counsel. Addressing only whether the discharge of the juror violated statutory rights under G.L.c. 234 § 39 (Opinion, p. 4), and erroneously finding that no hearing was necessary in order to discharge the juror, the Appeals Court did not even address Defendant's argument that the accused had a fundamental right to be present at all stages of the proceedings, including the court's discharge of the juror, because substantial rights were affected. *United States v. Cronin*, 466 U.S. 648, 659 (1984). We maintained that the trial judge's discharge of the juror without notice and/or the presence of the defendant and his counsel was structural error requiring an automatic reversal of the conviction. *United States v. Cronin*, 466 U.S. at 659.

Second, we argued that the Commonwealth's admitted suppression of exculpatory fingerprint evidence for a period of over three and one-half years and until after the commencement

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of trial, was so egregious that it should have resulted in a new trial or, at the very least, the preclusion of testimony from the Commonwealth's fingerprint expert (Opinion, Ex. "A", p. 3). Due process requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid in the defense against the pending charges. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Here, Defendant moved to preclude expert fingerprint testimony and evidence from Sgt. Robin Fabry, because of the untimely disclosure of an early Automated Fingerprint Identification System ("AFIS") search, which revealed that Defendant's prints did not match those found on the murder weapon, while as many as 20 other possible candidates did (Trial Transcript, Volume 4, page 264, hereinafter "T.IV/264"; T.V/14,18-20; T.XVI/61-62, T.XXVI/79,140-141,145). "Bad faith" was clearly shown on this record, given defense counsel's specific and repeated (4) requests for the evidence and the Commonwealth's admitted, 3-year delay in disclosure. It was not until September 21, 2005, in the midst of the *Daubert* hearing, and after the jury had already been selected, that Fabry finally revealed to the defense the existence of the exculpatory AFIS search (T.XXVI/84). Moreover, the prosecutor learned of Fabry's non-disclosure of evidence two weeks prior to the trial, and yet, he too "inadvertently" did not communicate that fact to defense counsel (T.V/289). Despite this record of prolonged suppression of exculpatory evidence and blatant police misconduct, the Appeals Court concluded that "no prejudice" was shown from the suppression of exculpatory evidence (Opinion, Ex. "A", p. 3). When a prosecutor receives a specific and relevant request, like here, the failure to make any response "is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976). *Agurs* commands that "the reviewing court must set aside the verdict and judgment unless it is sure that the error did not influence the jury, or had but very slight effect.'" *Id.* at 112. Here, the Defendant demonstrated that had the AFIS search been disclosed in advance of the trial, defense counsel, with proper and thorough investigation, could have developed evidence that numerous other suspects may have been the real culprit in the Gauthier homicide. A defendant has a fundamental constitutional right to present evidence that another person may have been responsible for the offense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). Given the Commonwealth's prolonged suppression of evidence, there simply was no time for defense counsel to investigate such third party culprit evidence, provided for the first time in the midst of trial, including

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with a fingerprint expert. In circumstances like this, the proper remedy was suppression of the proffered fingerprint expert testimony and evidence, if not outright dismissal of the charges.

Third, we maintained that there were fatal deficiencies in the Commonwealth's expert ballistic evidence which rendered it unreliable and inadmissible for due process purposes (Opinion, Ex. "A", p. 2). The ballistics evidence linked the .45 caliber Colt Commander pistol seized by police from Powell upon his arrest on September 16, 2002, to the casings and projectile recovered from the Gauthier crime scene. Defendant objected to this ballistics evidence, however, as unreliable under *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579 (1993). Tyrone Camper and Kathleen Doherty of the Boston Police Firearms Unit testified that as to projectiles, the protocol of their unit was to require a count of six consecutive striations, or, two running counts of three consecutive striations, before making a match (T.IV/152-153, 175-176; T.V/102); as to casings, there was no set criteria nor quota of matching markings (T.IV/155-156, 175-178). Captain Busa testified, on the other hand, that the Massachusetts State Police had no such minimum numeric protocol as to matching markings for either projectiles or casings (T.IV/52-62). Accordingly, Camper's, Doherty's and Busa's testimony did not establish the reliability and acceptance in a "relevant community" of their protocol and underlying methodology of comparison, nor did it point to any external source to validate their methodology, as required by *Daubert*. There was no agreement regarding how many similarities are required before declaring a "match" as to projectiles or casings. The proffered ballistics testimony failed to meet *Daubert's* standard for reliability because there were no meaningful and accepted validity studies and testing protocol or methodology in the field.

Equally important, the ballistics evidence should have been excluded because the Commonwealth did not carry its burden of showing, "that its methodology in this particular case was reliable. . . ." *United States v. Montiero*, 407 F.Supp.2d 351, 374 (D.Mass. 2006), citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994). Like the Government's ballistics expert in *Monteiro*, the examinations of the Commonwealth's ballistics experts in this case, "fall short of the mark in two major area: documentation and peer review." *Id.* With respect to documentation, standard guidelines require examiners to

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document their findings through the use of notes, sketches, and photographs, which sufficiently describe what led the examiner to his/her conclusions. A report that merely states a "positive ID" is insufficient; to be admissible, the basis for identification must be sufficiently described so that it is "reproducible and verifiable. . ." *Id.* Here, Tyrone Camper and Kathryn Doherty were erroneously permitted to merely give "positive ids" without setting forth an adequate basis for their identifications. They testified vaguely that there were "sufficient" matching markings on the projectile and casings, without specifically describing or documenting *which* of the markings were matching, and/or the specific *number* of matching markings, and their *sequencing*, i.e., whether six consecutive markings, or two running counts of three consecutive striations (T.IV/159-160,183-184,199-201,216; T.V/102-103,118-120). The same is true for Captain Busa, who only vaguely testified there were a "sufficient" number of matching markings without specific description or number (T.IV/48-52). Further, Busa's findings were never verified by an independent second qualified examiner in accordance with the generally accepted standard in the field. See, e.g., *Monteiro*, 407 F.Supp.2d at 351. Nor were photographs nor written records generally made of Camper's and Busa's underlying findings (T.IV/29,159-160,183-184). Boston Police protocol required photographing where, like here, a match of ballistics evidence was being made as to two separate investigations, i.e., the September 5th and September 16th incidents (T.IV/184-187). Both the trial court and the Appeals Court erroneously overlooked and did not address any of the above deficiencies -- none of which were factually disputed by the Commonwealth on appeal. Accordingly, the ballistics testimony should have been excluded as unreliable under *Daubert*.

Fourth, we argued that the evidence was insufficient to convict Defendant, especially since the Commonwealth's ballistics evidence was unreliable and should not have been admitted to begin with. Otherwise, there was no eyewitness to the crime, nor any blood, hair, fiber, DNA, or other forensic evidence connecting Powell to the crime (T.X/29-30). Moreover, the Commonwealth presented highly questionable and unreliable identification evidence from Suwanna Pankham and Bundiht Pankham that Powell supposedly was seen entering a black car across the street from 18 Wardman Road after gunshots were fired (T.XIII/134-137,191,230; T.XIV/118-120). The Pankams' respective viewing of the suspect was in "an instant" (Suwanna) (T.XIII/205-208) and/or in a "fraction of a second" (Bundiht)

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(T.XIV/163). Neither said they recognized Defendant when they first spoke to police (T.XIII/140-141,204; T.XIV/123-124,178). Likewise, Toby Pena testified that he saw a black male, whom he did not recognize, enter a black Nissan motor vehicle and drive away from the scene after the gunshots (T.XII/116-118,206-207,210; T.XIII/12); he saw the same car being operated by Powell the next morning, after which he purportedly identified Powell (T.XII/121-128,220). Even if the above witness identification evidence was credited, it established, at most, Defendant's presence in the general vicinity of 18 Wardman Road shortly after the shooting. Moreover, even if the incompetent ballistics testimony was credited, Defendant's being in possession of the alleged murder weapon 11 days later was insufficient, without more, to base the murder conviction. The evidence . . . did not establish the Commonwealth's charge beyond unacceptable conjecture or surmise, and the convictions are unreliable, and hence, violative of state and federal due process. *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *United States v. Spinney*, 65 F.3d 231, 234 (1st Cir. 1995).

Fifth, we maintained that admission of the hearsay drug certificate in admitted violation of Defendant's confrontation rights not only required a reversal of the conviction for possession with intent to distribute cocaine, see *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), but also required a reversal of the murder conviction as well. Commenting that the Commonwealth need not prove "motive" for the murder (Ex. "A", p. 3), the Appeals Court overlooked and/or misapprehended Defendant's argument that the trial judge erroneously allowed the Commonwealth to use the prejudicial hearsay certificate, indicating that there were 6.74 grams of "crack" cocaine in 32 separate twist bags of 71% purity recovered by police (T.XXV/79-80), to support its theory of the alleged murder, that Defendant shot and killed Paul Gauthier to "tak[e] care of the situation" caused by Gauthier's having "trashed" with an aluminum bat the alleged "crack" house at 16 Wardman Road from which Powell supposedly sold his drugs (T.XXIX/134). The erroneous admission of the incompetent hearsay drug certificate was not "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 22-23 (1967).

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(5) Citation to the case (if you know):

(6) Grounds raised:

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes

☒ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes ☒ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

N/A

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

N/A

(8) Date of result (if you know):

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(b) If you filed any second petition, application, or motion, give the same information: *N/A*

- (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):
- (4) Nature of the proceeding:
- (5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know): *N/A*

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know): *N/A*
- (4) Nature of the proceeding:
- (5) Grounds raised:

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(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No

(7) Result:

(8) Date of result (if you know):

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☐ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Whether the trial judge's discharge of a juror who called in sick to a court officer, without a hearing and without the presence of and/or prior notice to the defendant^{↓R} and his counsel, violated the defendant's constitutional right to be present for the proceedings against him?

(b) If you did not exhaust your state remedies on Ground One, explain why:

Grounds exhausted

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(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

direct appeal

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(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: *Application for further appellate review*

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Whether the Commonwealth's ~~suppressed~~^{admitted} suppression of exculpatory fingerprint evidence for a period of over three and one-half years and until after the commencement of the trial, violated defendant's due process rights under Brady v. Maryland, and its progeny, and was so egregious that it should have resulted in a new trial or, at the very least, the preclusion of testimony from the Commonwealth's fingerprint expert?

(b) If you did not exhaust your state remedies on Ground Two, explain why:

Grounds exhausted

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

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Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

direct appeal

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two

Application for further appellate review

GROUND THREE:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Whether there were fatal deficiencies in the commonwealth's expert testimony evidence that rendered it unreliable and inadmissible for due process purposes?

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(b) If you did not exhaust your state remedies on Ground Three, explain why?

Grounds exhausted

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Direct Appeal

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Whether the evidence was insufficient to convict the defendant as a matter of due process law?

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes

☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐

Yes

☒

No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

direct appeal

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FIVE

- (a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Whether the trial judge's erroneous admission of the hearsay drug certificate in violation of Defendant's confrontation rights, see Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), not only required a reversal of the drug conviction, but also, required a reversal of the murder conviction?

- (b) If you did not exhaust your state remedies on Ground Four, explain why:

- (c) **Direct Appeal of Ground FIVE**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

- (d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

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Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

direct appeal

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

Ground Six

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Prosecutorial misconduct is committed where the Defendant's Constitutional Rights, Massachusetts Declaration of Rights and laws of the United States are Violated by Hampering or Interference by the Prosecution Depriving the Defendant of Due Process of Law requiring Remand or Dismissal of Indictment.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

Pending review of motion to stay (see attachment)

(c) **Direct Appeal of Ground Six**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Counsel failed to raise issue

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *Rule 30(b)*

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Name and location of the court where the motion or petition was filed:

Suffolk Superior

Docket or case number (if you know): *02-11199*

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

DECISION Pending on RULE 30(b)

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground *SIX*

RULE 30(b)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

Ground Seven

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Ineffective Assistance of Counsel Applies where Counsel Failed to properly Challenge Commonwealth's Expert witness testimony by utilizing private institution(s) adequately to make a sound determination.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

Pending review of motion to stay (see attachment)

(c) **Direct Appeal of Ground SEVEN**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Ineffective Assistance of Counsel, where Counsel failed to raise issue.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *Rule 30 (b)*

Name and location of the court where the motion or petition was filed:

Suffolk Superior

Docket or case number (if you know): *02-11199*

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Decision Pending on Rule 30(b)

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground *EVEN*

Rule 30(b)

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(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

Ground Eight :

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Ineffective Assistance of Counsel applies where counsel failed to interview Commonwealth's witness for impeachment purpose.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

Pending review of motion to stay (SEE attachment)

(c) **Direct Appeal of Ground Eight**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes ☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Ineffective Assistance of Counsel where counsel failed to raise issue.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *Rule 30(b)*

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Name and location of the court where the motion or petition was filed:

Suffolk Superior

Docket or case number (if you know): *02-11199*

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Decision Pending Rule 30(b)

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground *Eight*

Rule 30(b)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

Ground Nine

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Ineffective Assistance of Counsel applies where counsel deprived defendant of his due process of law by failing to present a sound and effective defense, by not seeking a continuance after late disclosure of fingerprint evidence introduced at trial.

(b) If you did not exhaust your state remedies on Ground Four, explain why:

Pending review of motion to stay (see attachment)

(c) **Direct Appeal of Ground NINE**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes

☒ No

(2) If you did not raise this issue in your direct appeal, explain why:

Ineffective Assistance of Counsel, where counsel failed to raise issue.

(u) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *Rule 30(b)*

Name and location of the court where the motion or petition was filed:

Suffolk Superior

Docket or case number (if you know): *02-11199*

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☒ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

Decision Pending Rule 30(b)

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground *NINE*

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Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four:

Application for further appellate review

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

Ground 6, Ground 7, Ground 8, Ground 9

INEFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL FAILED TO RAISE ISSUES.

THIS DELAY IN FILING MY FEDERAL HABEAS IS DUE TO A MISUNDERSTANDING WITH SUFFOLK SUPERIOR COURT IN THE FAILURE TO RESPOND TO MY MOTION TO STAY ON A NEW TRIAL MOTION BEFORE MY 2014 FILING DEADLINE. THERE IS ALSO THE ISSUE OF THIS MOTION FOR A NEW TRIAL BEING IN THE HANDS OF CPC'S FOR SCREENING AND PURPOSE.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☒ No ☐

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. *SUFFOLK SUPERIOR COURT, BOSTON, MA. DOCKET # 02-11179*
THIS IS A MOTION FOR A NEW TRIAL THAT THE DEFENDANT FILED A MOTION TO STAY ON AT THE END OF JUNE, 2012. THE ISSUES RAISED WERE Ground 6, Ground 7, Ground 8 AND Ground nine

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: *Beth Eisenberg 44 Bromfield St. Boston, MA. 02108*
Cop Counsel Jonathan Shapiro 90 Canal St. Boston, MA. 02114

(b) At arraignment and plea: *Beth Eisenberg 44 Bromfield St. Boston, MA. 02108*
Cop Counsel Jonathan Shapiro 90 Canal St. Boston, MA. 02114

(c) At trial: *Beth Eisenberg 44 Bromfield St. Boston, MA. 02108*
Cop Counsel Jonathan Shapiro 90 Canal St. Boston, MA. 02114

(d) At sentencing: *Beth Eisenberg 44 Bromfield St. Boston, MA. 02108*
Cop Counsel Jonathan Shapiro 90 Canal St. Boston, MA. 02114

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16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing:

N/A

(b) At arraignment and plea: Beth Eisenberg 44 Bromfield St. Boston MA 02108

(c) At trial: Beth Eisenberg 44 Bromfield St. Boston MA 02108 co-counsel Jonathan Shapiro 90 Canal St Boston MA 02114

(d) At sentencing: Beth Eisenberg 44 Bromfield St. Boston MA 02108 co-counsel Jonathan Shapiro 90 Canal St Boston MA 02114

(e) On appeal: Donald Harwood Chatham, New York 12037 7 Railroad Ave

(f) In any post-conviction proceeding:

Donald Harwood 7 Railroad Ave Chatham, New York 12037

(g) On appeal from any ruling against you in a post-conviction proceeding:

Donald Harwood 7 Railroad Ave Chatham, New York 12037

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☐ No

N/A

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

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- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

REVERSE his conviction and him a new trial.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 12/14/11 (month, date, year).

Executed (signed) on 12/14/11 (date).

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

SUFFOLK SUPERIOR COURT

10:08 AM

Case Summary

Criminal Docket

SUCR2002-11199
Commonwealth v Powell, John

Date	Paper	Text
12/07/2009	142.0	receipt of the transcripts by counsel and the Court. Notice/Attest Appearance of Deft's Atty: Donald Harwood
04/11/2011	143.0	Rescript received from Appeals Court; judgment REVERSED On the charge of possession of cocaine with intent to distribute the judgement is reversed and the verdict is set aside. The judgements on the remaining charges are affirmed (J. Zanini, ADA and Atty. D. Harwood notified)
05/09/2011		Defendant not present, hearing continued until 6/23/2011 re: trial date - melendez diaz reversal as to Count 9. Wilson, Mag - C. Bartoloni, ADA - ERD/JAVS
06/23/2011		Defendant not present, continued by Order of the Court until 6/30/2011 for Status re: Melendez-Diaz Reversal. Brady, J. - G. Ogus for E. Zabin, ADA - ERD L. Beers.
06/28/2011		Defendant brought into court for on this date. Hearing re; motion to revise and revoke.
06/28/2011		Original sentence dated 11/23/05 revised to Offense # 001 - MC1 Junction for and during natural life from and after Offense #004. Mittimus issued. (Raymond J Brassard, Justice) E. Zabin, ADA - W. Greenlaw, CR - J. Shapiro, ATTY
06/29/2011		RE Offense 9:Nolle prosequi , statement filed.
07/09/2012	144.0	Deft files Pro-Se: Motion to Stay Proceedings on the Defendant's Motion for a New Trial. (Notice sent Brassard, J. w/copy and docket sheets - 8/21/12)

Attachment

EVENTS

Date	Session	Event	Result
11/25/2002	Magistrate Ctrm 705	Arraignment	Event held as scheduled
01/09/2003	Magistrate Ctrm 705	Conference: Pre-Trial	Event held as scheduled
01/28/2003	Magistrate Ctrm 705	Continuance by agreement Conference: Pre-Trial	Event held as scheduled
02/06/2003	Criminal 1 Ctrm 704	Continued by agreement. Re: Further PTC Hearing: Motion	Event held as scheduled
02/07/2003	Criminal 1 Ctrm 704	Continued by agreement. Re: Contested Issues. Hearing: Motion	Event held as scheduled
03/10/2003	Criminal 1 Ctrm 704	continuance by agreement. Hearing: Motion	Event not held--joint request
03/26/2003	Criminal 1 Ctrm 704	continuance by agreement re: Non - Evidentiary Motions. Hearing: Motion	Event held as scheduled
05/06/2003	Magistrate Ctrm 705	continuance by agreement re: Non - Evidentiary Motions. Conference: Status Review	Event held as scheduled
07/15/2003	Magistrate Ctrm 705	continuance by agreement. Status: Filing deadline	Event held as scheduled
09/09/2003	Magistrate Ctrm 705	Continued by agreement. Re: Filing and Scheduling of Evidentiary Motions. Status: Review by Session	Event held as scheduled
10/08/2003	Magistrate Ctrm 705	by agreement re: discovery Conference: Status Review	Event held as scheduled
12/02/2003	Magistrate Ctrm 705	Continued by agreement. Re: Discovery Compliance. Status: Filing deadline	Event held as scheduled
		Continued by agreement.	

Attachment